INVESTIGATION REPORT

MONITORING OF ASSIGNED-OUT CASES BY LEGAL AID DEPARTMENT

January 2006

Office of The Ombudsman

Hong Kong

EXECUTIVE SUMMARY

Direct Investigation:
Monitoring of Assigned-out Cases

Background

The Legal Aid Department ("LAD") provides financial assistance to litigants who meet the statutory criteria of financial eligibility and the merits for taking or defending legal proceedings. Legal aid cases are either dealt with by in-house counsel or assigned to lawyers in private practice ("assigned lawyers").

2. Over the years, we have received a number of complaints against LAD. We have also noted media reports alleging inadequacies of legal aid arrangements. Our view is that, as a custodian of public funds and provider of a public service, LAD has a duty to monitor progress of cases handled by assigned lawyers, ensuring efficient and cost-effective utilization of the Legal Aid Fund as well as appropriate service to the aided persons. In view of the public interest involved, The Ombudsman declared a direct investigation under section 7(1)(a)(ii) of The Ombudsman Ordinance, Cap. 397, on 7 April 2005.

The Ambit

3. The ambit of this direct investigation covered:

(a) administrative arrangements for assigning out legal aid cases;

(b) mechanism for monitoring progress of assigned-out legal aid cases, including the enforcement of court orders in such cases;

(c) system for evaluating the performance of assigned lawyers in handling assigned-out legal aid cases, including post-hearing follow-up action; and

(d) any problems identified in the current mechanism.

Access to Justice

4. Access to the courts and the right to confidential legal advice are enshrined in Article 35 of the Basic Law. However, litigation is costly. Unsuccessful litigant has to pay his own legal costs, and may be ordered by the court to pay the costs of the successful party. Government provides funds for legal aid to those who cannot afford the legal costs but satisfy

the statutory criteria. Set up in 1970, LAD administers initially one scheme and then a supplementary scheme in 1984 to assist the "sandwich class" who would otherwise exceed the financial limit of the ordinary scheme.

Legal Aid Services Council

5. In 1996, Government established the Legal Aid Services Council ("LASC") under the Legal Aid Services Council Ordinance, Cap. 489, to supervise the provision of legal aid services and to advise the Chief Executive on legal aid policy.

Legal Aid

6. In this investigation, we focus on LAD's monitoring of civil cases, because in criminal cases involving personal liberty of the accused, the prosecution usually sets the pace for the proceedings under the watchful eye of the court.

7. In civil cases, legal aid is available for proceedings such as matrimonial and personal injury cases. To qualify, applicants must satisfy the means test and the merits test.

Unsuccessful applicants may appeal to the Registrar of the High Court against the decision.

Director's First Charge

8. Being granted legal aid does not mean that services are necessarily provided free. If the aided person wins his case and succeeds in recovering damages or preserving property in the proceedings, the Director of Legal Aid ("DLA") has a right to recover from the aided person all the expenses and costs incurred in the case that cannot be fully recovered from the other party. This is DLA's right to first charge, stipulated in all legal aid certificates. By signing the certificate, an aided person agrees and is bound to pay the first charge. LAD also requires assigned lawyers to explain this to aided persons where appropriate.

Discharge and Revocation

9. A legal aid certificate is discharged when the aided proceedings have been disposed of. The certificate may also be discharged if the aided person insists on continuing with the proceedings even though there is no merit to do so.

10. DLA can also revoke legal aid granted in circumstances where the aided person fails to make a full and true disclosure of his financial resources or knowingly furnishes a false statement.

Assigning Out

11. LAD has formulated guidelines and procedures on the assignment and monitoring of legal aid cases in its Operation Manual. Statistics on civil cases assigned out in the past three years are set out below:

Year	Civil Cases	
	Total	**Assigned out**
2002/03	10,014	7,660
2003/04	10,531	6,788
2004/05	8,408	5,349
Total	28,953	19,797

Source: LAD

Choice of Assigned Lawyers

12. If the aided person has nominated a lawyer, LAD does not reject that preference unless there are compelling reasons.

13. If the aided person does not make a nomination, LAD assigns a lawyer from the Legal Aid Panels, which comprise about 2,000 solicitors and 700 barristers.

Re-assignment of lawyer

14. Aided persons cannot discharge the assigned lawyer without the leave of DLA. If an aided person wishes to change the assigned lawyer, LAD has to consider whether the request is reasonable.

Monitoring of Cases

15. LAD defines its duty for monitoring assigned lawyers by reference to:

(a) the case of *Ngao To-ki v Attorney General*[1], in which the Court of Appeal decided in 1981 that DLA's primary duty is to administer the legal aid scheme competently with due regard to the public purse. He is "under no duty to invigilating the performance of the assigned lawyers"; and

(b) regulation 12 of the Legal Aid Regulations, which provides that the conduct of proceedings by the assigned lawyer is, under certain circumstances, subject to DLA's scrutiny.

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[1] In *Ngao To-ki v Attorney General (Civil Appeal No. 67 of 1980)* [1981] HKLR 259-297, the plaintiff claimed to have suffered damage due to the negligence of the assigned lawyer and DLA. The claim against DLA was dismissed.

"Bring up" Mechanism and Progress Reports

16. LAD officers are to bring up all case files for review at least every three months and decide whether to ask the assigned lawyers for progress reports. If requests or reminders for progress reports are ignored or not adequately responded to, LAD officers are to send a personal letter to the assigned lawyer. If two reminders and one personal letter are ignored, the LAD officer has to alert his section head, who would then issue a warning letter. If the assigned lawyer still fails to respond, the LAD officer, his section head and an Assistant Director or Deputy Director will discuss the case and consider re-assignment and reporting to the Departmental Monitoring Committee ("DMC").

Evaluation

17. LAD officers are required to complete an evaluation report on the performance of assigned lawyers for their first assignment, when their performance is considered unsatisfactory or if they are on LAD's records for unsatisfactory past performance. The evaluation reports will be considered by DMC.

Departmental Monitoring Committee

18. Chaired by DLA, DMC comprises a Deputy Director, two Assistant Directors, three Assistant Principal Legal Aid Counsel and a representative from the Corruption Prevention Department of the Independent Commission Against Corruption. In the past three years, DMC had considered 28 unsatisfactory evaluation reports:

Year	Unsatisfactory reports	Follow-up Action					
		None[2]	Warning letter	Record of Unsatisfactory Performance /Conduct	Removal from Panel at lawyer's request	Removal from Panel by LAD	Pending
2002/2003	14	3	2	8	1	0	0
2003/2004	7	1	1	4	0	0	1
2004/2005	7	0	2	3	0	1[3]	1
Total	**28**	**4**	**5**	**15**	**1**	**1**	**2**

Source: LAD

Case Studies

19. We have studied a number of cases with the aided persons' consent. Our findings are summarised as follows:

Case 1

LAD staff was not fully acquainted with the experience of the Panel lawyer nominated

[2] LAD is satisfied with lawyers' explanation.

[3] Case also referred to the Law Society.

for assignment.

[LAD response: Assignment history is now readily retrievable from the Case Management and Case Accounting System.]

Case 2

The need was highlighted for LAD or the assigned lawyer to explain clearly in layman terms to aided persons or to remind them of the implications of the first charge to avoid raising false hopes in them.

[LAD response: The assigned lawyer had on numerous occasions explained the first charge to the aided person.]

Cases 3

LAD did not intervene even when the assigned lawyer had not responded to ten requests or reminders for progress over a period of two years. Subsequent intervention shows that LAD could take proactive control of a case.

[LAD response: No major step in proceedings could be taken until medical conditions of the aided person had stabilised.]

Cases 4

LAD did not intervene even when the assigned lawyer had not responded to 15 requests or reminders for progress over a period of three years. LAD did not take early and firm action against the assigned lawyer in accordance with its Operation Manual.

[LAD response: The assigned lawyer was subsequently placed on the Record of

Unsatisfactory Performance.]

Case 5

LAD did not take action even when the assigned lawyer continued to ignore its repeated requests for reports and despite the threat for referral to DMC.

[LAD response: An evaluation report on the assigned lawyer's unsatisfactory performance had been made.]

Case 6

LAD allowed the assigned lawyer over a year to finalise and clear accounts after settlement. It did not spark even on the assigned lawyer's indication of financial difficulties, resulting in the aided person not benefiting from the legal proceeding.

[LAD response: No panel lawyer had practised fraud on LAD and absconded before.]

Case 7

LAD wrote off the amount due from the opposite party, who was ordered by the court to pay legal costs. It was reluctant to take legal action to enforce judgment.

[LAD response: It was not cost-effective to take enforcement proceedings as amount overdue was small.]

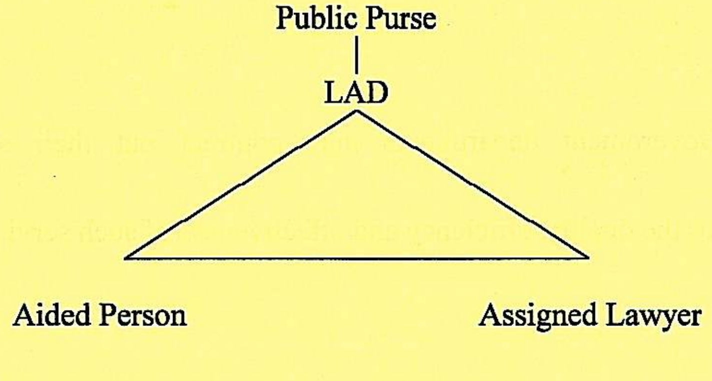
20. These case studies show that LAD guidelines, though well formulated in theory and on paper, are not always followed in practice. Clearly, in these cases, LAD's guidelines and actions have failed to protect the aided persons' interests or the public purse.

DMC also seems ineffective as a deterrent to incompetent or ineffectual assigned lawyers.

Observations and Opinions

21. We are well aware of the judgment in the *Ngao To-ki* case (para. 15). However, this investigation does not examine the legal or professional duty of LAD to aided persons. Our focus is on LAD's duty in its administration of the legal aid services. We consider LAD to have **administrative accountability** for the efficient and cost-effective operation of the legal aid schemes.

22. We see a tripartite relationship among LAD, the aided person and the assigned lawyer.



As with any other Government department, LAD provides service, specifically to aided persons.

First Charge

23. Many aided persons are unaware of or have difficulty understanding the first charge and its implications. Somehow, aided persons should be helped to understand better the operation of the first charge and its implications.

Monitoring of Cases

24. LAD has placed undue emphasis on the *Ngao To-ki* judgment in limiting its duties to the letter of the law. As a Government department, it has a duty not just to ensure value for public funds, but also to provide quality service to aided persons as well. A poor performing assigned lawyer cannot be good value for public money or effective advocate for an aided person.

25. Government departments may contract out their services, but not the accountability for the quality, efficiency and effectiveness of such services.

"Bring up" Mechanism and Progress Reports

26. It is good practice to ensure that all cases receive timely attention. However, after reviewing case files, individual officers have a great deal of latitude in deciding whether or not to call for progress reports. In one case, the assigned lawyer simply ignored all 15 reminders and letters over almost three years. Far more positive and disciplined action by LAD appears to be in order.

Evaluation and Appraisal of Assigned Lawyers

27. LAD has an evaluation proforma for assessing unsatisfactory performance of assigned lawyers. We consider this arrangement commendable. However, the description of and criteria for unsatisfactory performance are too vague. Defined **trigger points** would help to identify possible problems and ensure a clearer and more consistent approach in evaluation.

28. At present, unsatisfactory evaluation reports are few and far between in proportion to the volume of assigned-out cases (paras 11 and 18). There is a need for more stringent standards in such evaluation. The current "negative" evaluation should be supplemented by some appraisal system under the supervision of DMC for an overall grading of individual assigned lawyers on conclusion of a case. To avoid burdening LAD, it should be effective and efficient yet simple.

Intervention by LAD

29. In one case where the assigned lawyer first hinted his cash flow problem in April 2003, LAD chose to be sympathetic and did not act. In the event, the assigned lawyer absconded in January 2005. It was both an unfair blow to the aided person, who was then unable to recover anything, and a sheer waste of public funds.

30. In case of professional misconduct, LAD may report to the two legal professional bodies. However, only one report has been made in the past three years. We consider the current guidelines too vague and LAD practice too lax.

Enforcement of Judgments

31. LAD should be ready to take firm action to enforce judgments. In particular, it should institute legal proceedings after due warning has been given. Otherwise, not only does the aided person not get his due, the credibility of Government and indeed the judicial system could be placed at stake.

Views from Legal Aid Services Council

32. Problems in LAD's monitoring system were first identified by an inter-departmental Working Group to Review the Monitoring of Assigned-out Cases set up by the Administration in December 1997. It recommended numerous improvement measures, many of which were medium to long-term. In October 1998, LASC set up a working party to follow up the measures. In January 2003, an interest group of LASC recommended that LAD should draw up checklists for use by assigned lawyers. Regrettably, despite earnest supervision for almost a decade, efforts by LASC seemed to have made little impact on the monitoring of assigned lawyers.

Concluding Remarks

33. Legal aid ensures access to justice for those who cannot afford the legal costs. Once granted legal aid, the aided person is protected from liability for legal costs in case he loses the case. However, LAD's present operation of the schemes does not assure compensation to aided persons even with a favourable judgment.

34. Case 6, where the aided person did not benefit at all, raises questions:

(a) Should public funds be used to finance litigation where the aided person does not benefit at all?

(b) Should an assigned lawyer be allowed to drag out a case for higher legal costs?

35. Given the thousands of cases assigned out every year, we accept that it is unreasonable and unrealistic to expect LAD to monitor each and every case closely. We also take LAD's point about leaving matter to the assigned lawyer's professional processing. However, that must not mean leaving matters to the assigned lawyer only. Realistic standards and consistent criteria for monitoring should be put in place **and** in practice. The current monitoring mechanism verges on being a paper exercise.

Recommendations

36. A fundamental change is needed in LAD's concept of and approach to monitoring of legal aid cases. The Ombudsman has made the following recommendations to the Director of Legal Aid:

First Charge

(1) to explain clearly in simple layman terms to legal aid applicants the operation and implications of the first charge and then, direct or via assigned lawyers, from time to time of the implications;

Monitoring

(2) to review and re-orientate the mentality in monitoring the performance of assigned lawyers;

(3) to consider a more formal "contractual" arrangement to facilitate LAD's effective monitoring of assigned lawyers' performance in discharging their duties;

Progress Reports

(4) to remind staff not just to make timely issue of requests and reminders for progress reports but also to set reasonable limits for such reminders with a view to escalating supervisory action;

(5) to develop more effective means to ensure assigned lawyers' timely delivery of progress reports and early conclusion of cases;

(6) to revise procedures to ensure timely completion of post-judgment action;

(7) to review procedures to make for effective and flexible sanction against unresponsive and irresponsible lawyers instead of making empty threats of referral to DMC;

Evaluation and Appraisal of Assigned Lawyers

(8) to identify trigger points for evaluation of unsatisfactory performance of an assigned lawyer;

(9) to supplement this by an effective and efficient yet simple appraisal system under the supervision of DMC (e.g. award of an overall grade to assigned lawyers upon conclusion of cases);

Intervention by LAD

(10) to review guidelines to specify the circumstances under which officers should intervene or re-assign cases;

(11) to review guidelines to specify the circumstances under which officers should refer cases to the two professional bodies for further investigation;

Enforcement of Judgments

(12) to strengthen the current arrangements to enforce judgments and to institute legal proceedings for contempt after warning has been given;

Checklist

(13) to re-consider the checklist arrangements proposed by the Interest Group of LASC;

Administration of Legal Aid Services

(14) to consider ways to enhance the effectiveness of LASC with effective monitoring.

Comments from LAD

37. LAD has provided us with a very detailed response to our observations, comments and recommendations. It points out that a balance must be struck between the need to monitor assigned-out cases and to sanction under-performance, and the need to entrust the assigned lawyers with the responsibility and latitude to conduct the cases according to their professional judgment.

Comments from LASC

38. LASC appreciates our concern over effective monitoring of assigned-out cases and will continue to make efforts to improve governance.

Final Remarks from The Ombudsman

39. The Ombudsman recognises the need of LAD to strike a balance. However, the question is where and when to draw the line. For a monitoring system to be efficient and effective, there must be some points in the conduct of the assigned lawyer to trigger possible intervention and perhaps even sanction.

40. The Ombudsman maintains that LAD has a responsibility to ensure appropriate service to aided persons as well as efficient and cost-effective utilization of public funds. This duty is succinctly stated by the Chief Justice in his address at the Opening of the Legal Year 2006 on 9 January 2006:

> "The Legal Aid Department has a duty to ensure that [legal aid] funds are well spent and value for money is obtained. In particular, it has to exercise sound judgment in assigning cases so that counsel and solicitors of appropriate competence are instructed".

The Ombudsman shares this view.

41. In conclusion, The Ombudsman thanks DLA and his staff for assistance throughout this investigation. She also thanks LASC for its views.

FOOD FOR THOUGHT

42. Apart from highlighting the inadequacies in LAD's monitoring of assigned-out cases, this exercise has also identified the apparent lack of monitoring over the professional standard of the legal professions. In some of the cases we studied, certain steps taken, or missed, by lawyers in the proceedings were clearly not in the best interests of their clients. Unless such practices amount to professional misconduct, the only course of action available to such clients is to bring a lawsuit for professional negligence. This is a costly option which is not without risks. In essence, the client would have to find another lawyer who is prepared to accept his case and risk the high costs of litigation. It is perhaps no accident that such lawsuits are far and few between.

43. The Chief Justice has recently raised the question of "appropriate competence" among counsel and solicitors (para. 40). In this context, The Ombudsman notes that the two legal professional bodies refer in their code of conduct to their members having "a duty to be competent" in their professional services. However, it is not obvious to those outside the legal professions how current arrangements for monitoring professional competence work.

There is, therefore, a need for the two legal professional bodies to explore, perhaps in consultation with the Administration, how best to promote awareness, and enhance the effectiveness, of such mechanism.

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1

INTRODUCTION

BACKGROUND

1.1 The Legal Aid Department ("LAD") provides financial assistance to litigants who meet the statutory criteria as to financial eligibility and the merits for taking or defending legal proceedings. Legal aid cases are either dealt with by in-house counsel or assigned to lawyers in private practice ("assigned lawyers"). The majority of criminal cases and approximately two-thirds of civil cases are assigned out. In 2004/05, legal aid costs for assigned-out cases amounted to $367 million.

1.2 Over the years, we have handled a number of complaints against LAD. We have also noted media reports from time to time alleging inadequacies of legal aid arrangements. Our view is that, as a custodian of public funds and provider of a public service, LAD has a duty to monitor progress of cases handled by assigned lawyers, ensuring efficient and

cost-effective utilization of the Legal Aid Fund as well as appropriate service to the aided persons.

1.3 In view of the public interest involved, The Ombudsman informed the Director of Legal Aid ("DLA") on 18 March 2005 that she had decided to initiate a direct investigation under section 7(1)(a)(ii) of The Ombudsman Ordinance, Cap. 397. The Ombudsman announced this direct investigation in a press conference on 7 April 2005.

PURPOSE AND AMBIT

1.4 The ambit of our investigation covered:

(a) administrative arrangements for assigning out legal aid cases;

(b) mechanism for monitoring progress of assigned-out legal aid cases, including enforcement of court orders in such cases;

(c) system for evaluating the performance of assigned lawyers in handling assigned-out legal aid cases, including post-trial/settlement follow-up action; and

(d) any problems identified in the current mechanism.

METHODOLOGY

1.5 We have studied and analysed information provided by LAD including administrative procedures, statistical data and case files. We held discussions with LAD representatives periodically during the investigation.

1.6 Members of the public were invited to give comments and suggestions from 7 April to 6 May 2005. We have received two written representations. We also wrote to the Bar Association, the Law Society and the Legal Aid Services Council ("LASC") for views. On invitation, we met LASC's Interest Group on Assignment System and Monitoring of Assigned-out Cases on 16 June. We met the full Council on 29 June 2005. We are

grateful to LASC for the invitation and for its views on the subject.

1.7 To access legal aid case file for study, consent of the aided persons concerned is required under section 24(4)(c) of the Legal Aid Ordinance, Cap. 91. Through LAD, we addressed two hundred aided persons whose cases had taken over five years to complete. 36 of them gave consent. We are grateful to LAD and the aided persons concerned for their assistance in allowing us access to those case files.

INVESTIGATION REPORT

1.8 A draft investigation report was sent on 15 December 2005 to DLA and LASC for comments. On 29 December 2005, a meeting was held between LAD and this Office for exchange of views. In the meeting, a delegation of directorate representatives from LAD provided comments on the draft report in some detail. We received LAD's written comments on 11 and 13 January 2006 and LASC's on 12 January 2006. This final report was issued on 17 January 2006.

2

LEGAL AID SCHEMES

ACCESS TO JUSTICE

2.1 Access to the courts is a fundamental right. In this context, it is crucial for people having access to legal advice to know where they stand in the face of legal issues. In Hong Kong, access to the courts and the right to confidential legal advice are enshrined in Article 35 of the Basic Law.

2.2 Litigation is costly. Hong Kong is no exception. Median litigation costs per legal aid case in 2004/05 are provided below:

Case Type	**Median Costs ($)**
Employees' compensation cases	77,085
Matrimonial cases	14,372
Contract of employment cases	60,575
Judicial review cases	107,987

Personal injury cases	210,325
Running down (traffic accident) cases	148,000

Source:LAD's comments on 11 January 2006.

2.3 In legal proceedings, the court may order the unsuccessful litigant to pay not only his own legal costs but those of the successful party.

2.4 Legal aid provides financial assistance to those who cannot afford the legal costs but satisfy the statutory criteria as to financial eligibility. Set up by law (para. 2.7), LAD administers initially one scheme in 1970 and a supplementary scheme was added in 1984 (para. 2.17).

Year	Applications received	Civil Cases		Costs (million)
		Granted	refused	
2002/03	25,590	10,165	13,134	$377
2003/04	21,219	10,493	8,161	$339
2004/05	16,698	8,566	6,194	$308

Source: LAD

2.5 Being granted legal aid does not mean that services are necessarily provided free. If money or property is recovered or preserved

through legal aid, the aided person has to repay LAD for the costs incurred[1].

Legal Aid Services Council

2.6 In 1996, LASC was established by law to supervise the provision of legal aid services and advise the Chief Executive on legal aid policy. LASC comprises a Chairman and four members not connected with the practice of law, two barristers, two solicitors and DLA[2]. The relationship between LASC and LAD is prescribed by section 4(1) of the Legal Aid Services Council Ordinance, Cap. 489:

> "[LASC] is responsible for overseeing the administration of the legal aid services provided by [LAD] and [LAD] is accountable to [LASC] for the provision of such services."

Government has, therefore, made provision for LAD's administration of the legal aid schemes to be monitored. We will see in Chapter 5 whether this has

[1] "Legal aid helps those who lose cases, not those who win. Legal aid makes 'out and out' grant to those who lose cases. It only makes loans to those who win them", Sir John Donaldson, former Master of the Rolls, England.

[2] Section 5 of the Legal Aid Services Council Ordinance, Cap. 489.

been effective.

LEGISLATION

2.7 The Legal Aid Ordinance provides for the administration of legal aid cases in civil actions and the Legal Aid in Criminal Cases Rules, Cap. 221 in criminal proceedings.

LEGAL AID

Criminal Cases

2.8 For criminal cases, legal aid is available for proceedings in:

(a) the District Court and the Court of First Instance;

(b) committal proceedings in the Magistrates' Courts;

(c) appeals from the Magistrates' Courts; and

(d) appeals to the Court of Appeal and the Court of Final Appeal.

Civil Cases

2.9 For civil cases, the Ordinary Legal Aid Scheme ("OLAS") is available for civil proceedings in the District Court, the Court of First Instance, the Court of Appeal and the Court of Final Appeal. OLAS covers the following main areas:

(a) matrimonial matters;

(b) judicial review;

(c) Bill of Rights;

(d) immigration;

(e) commercial/contentious probate/miscellaneous claims;

(f) employment;

(g) employees' compensation;

(h) landlord and tenancy disputes;

(i) air or sea collision;

(j) traffic accidents;

(k) personal injury claims;

(l) assaults;

(m) medical negligence claims;

(n) professional negligence claims; and

(o) wages claims.

Eligibility

Civil Proceedings

2.10 To be eligible under OLAS, an applicant must satisfy both the means and the merits tests. The means test evaluates whether the financial resources of an applicant exceed the statutory limit of $155,800[3].

2.11 The applicant must also pass a merits test[4] to satisfy DLA that the case has a reasonable chance of success in court. Moreover, DLA has to take into account such factors as whether a judgment can be enforced, for example, it may not be worth litigating if the opposite party is insolvent or cannot be located.

2.12 Where the benefits obtainable cannot be measured in monetary

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[3] Section 5 of the Legal Aid Ordinance. Calculation of financial resources is detailed in the Legal Aid (Assessment of Contributions) Regulations.

[4] Section 10 of the Legal Aid Ordinance.

terms, DLA will give due weight to the importance of the case to the applicant in deciding whether to grant legal aid.

2.13 In 2004/05, of the 6,194 unsuccessful applications (para. 2.4), 777 failed on means and 5,417 on merits.

Criminal Proceedings

2.14 Applicants for legal aid in criminal cases have to pass a means test on the same criteria[5]. However, they may apply for exemption in capital cases[6]. DLA also has discretion to grant legal aid to applicants in criminal cases who have failed the means test if he considers it to be in the interest of justice[7].

2.15 In criminal proceedings, the liberty of the accused is at stake. Where DLA has refused to grant legal aid, if it appears to a judge that the accused should be legally represented, the judge may order DLA to grant the

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[5] Rule 4 of the Legal Aid in Criminal Cases Rules.

[6] Murder, treason, piracy with violence, Rule 13 of the Legal Aid in Criminal Cases Rules.

[7] Rule 15(2) of the Legal Aid in Criminal Cases Rules.

accused a legal aid certificate. DLA would then assign lawyers to represent the accused[8].

Appeal

2.16 In civil cases, unsuccessful legal aid applicants may appeal to the Registrar of the High Court within 14 days[9] against DLA's decision.

Supplementary Legal Aid Scheme

2.17 Since October 1984, the Supplementary Legal Aid Scheme ("SLAS") has been set up to assist the "sandwich class" who would otherwise exceed the OLAS financial limit. This scheme offers legal aid for applicants whose resources do not exceed $432,900, in cases involving personal injury or death as well as medical, dental or legal professional negligence for damages likely to exceed $60,000. It also covers claims under the Employees' Compensation Ordinance irrespective of the amount claimed.

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[8] Rule 8(3) of the Legal Aid in Criminal Cases Rules.

[9] Section 26 or 26A of the Legal Aid Ordinance.

2.18 SLAS, funded by contributions from aided persons or compensation recovered (para. 2.19), is self-financing.

DLA's First Charge

2.19 If the aided person wins his case and succeeds in recovering damages or preserving property in the proceedings, DLA has a right to recover from the aided person all the expenses and costs incurred in the case that cannot be fully recovered from the other party. This is DLA's right to first charge. Under SLAS, DLA will deduct a further 12%[10] of the damages recovered as contribution towards the Supplementary Legal Aid Fund.

2.20 The first charge is stipulated in all legal aid certificates. By signing the certificate, an aided person agrees and is bound to pay the first charge. LAD also requires assigned lawyers to explain this to aided persons where appropriate.

Discharge and Revocation[11]

[10] If the case is settled before counsel is briefed to attend trial, the percentage is 6%.

[11] Regulation 8 of the Legal Aid Regulations.

2.21 A legal aid certificate is discharged when the aided proceedings have been disposed of. The certificate may also be discharged if the aided person insists on continuing with the proceedings even though there is no merit to do so. Upon discharge of the legal aid certificate, services to the aided person will cease.

2.22 DLA can also revoke legal aid granted in circumstances where the aided person fails to make a full and true disclosure of his financial resources or knowingly furnishes a false statement. Upon DLA's revocation of the legal aid certificate, the aided person will be treated as never having received legal aid and will be liable for all costs incurred or payable by DLA on his behalf.

2.23 Before discharge or revocation, the aided person will usually be given an opportunity to state any reasons why the legal aid certificate should not be discharged or revoked.

3

ASSIGNING OUT

CIRCUMSTANCES FOR ASSIGNING OUT CASES

3.1 In assigning out civil cases, LAD considers the following circumstances:

(a) whether the capacity and workload of LAD permits new cases to be handled in-house;

(b) whether expertise for the case is available in-house;

(c) whether the aided person has nominated a private lawyer to act for him;

(d) whether parties to proceedings are both legally aided and if so, one of the parties must be represented by a private lawyer;

(e) whether a conflict of interests arises or is likely to arise, e.g. an action against LAD;

(f) whether before legal aid is applied for or granted, the aided person is already represented by a private lawyer; and

(g) whether the case is connected to other cases already assigned out, e.g. employee's compensation and if so, the case will be assigned to the same private lawyer.

LASC has decided that LAD should assign out cases concerning judicial review, challenges on human rights or the Basic Law, or where Government or a public agency is involved as the defendant.

3.2 For criminal cases, all District Court trials are assigned out. For the High Court, LAD acts as instructing solicitors in all criminal trials in the Court of First Instance and all criminal appeals, unless the interest of justice requires separate representation for the aided persons.

LEGAL AID PANELS

3.3 LAD maintains two Legal Aid Panels, respectively for solicitors

and barristers in private practice[12]. All holders of a practising certificate qualify for inclusion in the Panels.

3.4 Any lawyer interested in legal aid work can get onto the Panels by submitting a form to LAD indicating his professional experience and expertise. Since late 2002, this information is stored in a computer system, to which LAD adds other information, such as performance and conduct, over time.

3.5 At present[13], the Panels comprise 2,181 solicitors and 714 barristers.

3.6 Statistics on cases assigned out in the past three years are set out below:

Year	Civil Cases		Criminal Cases	
	Total	Assigned out	Total	Assigned out
2002/03	10,014	7,660	2,948	1,975
2003/04	10,531	6,788	2,700	2,025

[12] Section 4(1) of the Legal Aid Ordinance.

[13] As at 25 August 2005.

2004/05	8,408	5,349	2,941	2,278
Total	28,953	19,797	8,589	6,278

Source: LAD

CHOICE OF ASSIGNED LAWYERS

Aided Person's Preference

3.7 Once DLA has decided to assign out a case, the aided person can nominate a lawyer or ask DLA to nominate one from the Legal Aid Panel.

3.8 The law[14] allows an aided person the choice of a lawyer. It is however unclear whether the law requires DLA to accept the aided person's nomination. In this connection, LAD has sought advice from two eminent counsel. One has advised that in assigning out a case, DLA is bound to instruct the nominee; the other that DLA is not bound by the nomination but must give sufficient weight to the aided person's choice.

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[14] Section 13(1) of the Legal Aid Ordinance sets out three alternatives:
(a) the Director (of Legal Aid) may act himself; or
(b) the Director may assign counsel or solicitor selected by the aided person if he so desires; or
(c) the Director may assign counsel or solicitor selected by him.

3.9 In the light of legal advice, LAD does not reject an aided person's preference unless there are compelling reasons: e.g. the practitioner does not hold a valid practising certificate, is suspended from practice, has been excluded from the Panel for poor performance or is not available. If the nominee does not meet the normal criteria and is considered unsuitable, LAD will suggest that the aided person consider making another nomination.

Selection by LAD

3.10 If the aided person does not make a nomination, LAD will assign a solicitor based on availability, expertise, experience, conduct and performance. All assigned lawyers must have at least three years of post-qualification experience.

3.11 For cases involving medical or professional negligence, administrative or constitutional law, the assigned lawyer must have handled at least five such cases (whether or not legally aided) in the relevant field in the past three years. For other civil cases, he must have handled at least 16. For criminal cases, the assigned lawyers should:

(a) have at least three years of post-admission/post-call experience in the legal field;

(b) have handled at least five criminal cases in the past three years in the relevant field of work; and

(c) meet the minimum experience requirements specified below:

  (i) cases in the District Court -
  at least three years relevant criminal litigation experience;

  (ii) cases in the Court of First Instance and
  appeals from the Magistrates' Court at least five years relevant criminal litigation experience;

  (iii) appeals to the Court of Appeal and the Court of Final Appeal:
  at least seven years relevant criminal litigation experience for counsel, and at least five years relevant criminal litigation experience for instructing solicitor for appeals to the Court or Appeal; and

  at least ten years relevant criminal litigation experience for counsel, and at least seven years relevant criminal litigation experience for instructing solicitors for appeals to the Court of Final Appeal.

  The number of cases handled in the Court of Appeal and in the Court of Final Appeal is

considered jointly for the purpose of counting the past criminal cases experience.

3.12 In assigning cases, LAD avoids exceeding the following limits as far as possible:

Category	Number assigned in 12 months	
	Solicitor	**Counsel**
Civil cases	50	30
Criminal cases	30 or $600,000 in fees	30 or $1.2 million in fees

Source: LAD

Re-assignment of lawyer

3.13 Aided persons cannot discharge the assigned lawyer without the leave of DLA[15]. If an aided person wishes to change the assigned lawyer, LAD has to consider whether the request is reasonable.

3.14 If there are good reasons, LAD would arrange for re-assignment after securing in writing the aided person's understanding of the additional

15 Section 25(1) of the Legal Aid Ordinance.

costs incurred in consequence. Where the request is considered unreasonable, LAD may discharge the legal aid certificate (para. 2.21).

MONITORING OF CASES

Monitoring

3.15 ***Definition of Duty.*** LAD has formulated guidelines and procedures on the assignment and monitoring of legal aid cases in its departmental manual ("Operation Manual"). LAD defined its duty with regard to monitoring assigned lawyers by reference to "the landmark case" of *Ngao To-ki v Attorney General*[16], in which the Court of Appeal decided that DLA's primary duty is to administer the legal aid scheme competently with due regard to the public purse. He is "under no duty to supervise the performance of the assigned lawyer"[17]. In the Operation Manual, it is stated that:

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[16] In *Ngao To-ki v Attorney General (Civil Appeal No. 67 of 1980)* [1981] HKLR 259-297, the plaintiff claimed to have suffered damage due to the negligence of the assigned lawyer and DLA. The claim against DLA was dismissed.

[17] Headnote on the judgment.

"... it has always been a tenet of legal aid that a legally aided person should not be in a better position than a solicitor's private client. However, because our duty is to the public purse, it follows that by ensuring that litigation proceeds with due dispatch then, as a by-product, the aided person will naturally derive benefit from this".

In the Guidance Notes to Solicitors, LAD has reiterated that it is the duty of the assigned lawyer to determine the course of proceedings in the interest of the aided persons.

3.16 ***Statutory Duty.*** Regulation 12 (**Annex 1**) of the Legal Aid Regulations provides that the conduct of proceedings by the assigned lawyer is, under certain circumstances, subject to DLA's scrutiny. For instance, regulation 12(2) lists the steps in the proceedings that require prior approval from DLA and regulation 12(9) requires the assigned solicitor to report progress.

"Bring up" Mechanism

3.17 To monitor progress of assigned-out cases, LAD officers are required to bring up[18] all case files for review every three months. They may bring up the files more frequently where necessary.

Progress Reports

3.18 Departmental guidelines also require that upon review of a case, LAD officers are to decide whether to ask the assigned lawyers for progress reports. As assigned lawyers charge for their time spent on preparing progress reports, LAD is mindful of the cost involved, and this may affect the extent of monitoring LAD adopts. If requests or reminders (in standard template) for progress reports are ignored or not adequately responded to, LAD officers are to send a personal letter to the assigned lawyer. If two reminders and one personal letter are ignored, the LAD officer has to alert his section head[19], who would then issue a warning letter. If the assigned lawyer still fails to respond, the LAD officer, his section head and an Assistant Director or Deputy Director will discuss the case and consider re-assignment and reporting to the Departmental Monitoring Committee ("DMC").

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[18] Departmental Circular (Civil Processing) No. 18 of 1998.

[19] An Assistant Principal Legal Aid Counsel (Directorate D1 officer).

Evaluation

3.19 LAD officers are required to complete an evaluation report on the performance of assigned lawyers in the following circumstances:

(a) the lawyer is on his very first legal aid assignment; or

(b) the lawyer's performance or conduct is considered unsatisfactory (**Annex 2**); or

(c) the lawyer has been included in the Record of Unsatisfactory Performance/Conduct (para. 3.2).

3.20 If the performance of an assigned lawyer is considered unacceptable (usually for lack of progress), LAD may replace him before the conclusion of proceedings.

3.21 If the unsatisfactory performance, breach of legal aid legislation or professional misconduct is of a serious nature, DLA may, on the advice of DMC, remove the lawyer from the Legal Aid Panel. An act or default is serious if it has substantially prejudiced the aided person's interests, put the

Legal Aid Fund at risk or brought the legal aid service into disrepute. If such case involves professional misconduct, LAD may lodge a complaint with the professional body concerned.

Departmental Monitoring Committee

3.22 Reports of unsatisfactory performance are referred to DMC for consideration. Chaired by DLA, DMC comprises a Deputy Director, two Assistant Directors, three Assistant Principal Legal Aid Counsel and a representative from the Corruption Prevention Department of the Independent Commission Against Corruption. This Committee meets quarterly to consider reports on assigned lawyers and about assignments to lawyers on the Legal Aid Panels and to issue guidelines as appropriate with regard to the assignment and monitoring of legal aid cases.

3.23 DMC will consider placing an assigned lawyer on the Record of Unsatisfactory Performance/Conduct if:

(a) his performance is grossly unsatisfactory; or

(b) he has failed to comply with legal aid provisions; or

(c) he has committed professional misconduct.

Such lawyers will require special approval[20] for other assignments. Furthermore, subsequent assignments will continue to be evaluated until after at least two consecutive satisfactory reports, DMC is satisfied that their names may be removed from the Record.

3.24 In the past three years, there had been 28 unsatisfactory evaluation reports:

Year	Unsatisfactory reports	Follow-up Action					
		None[21]	Warning letter	Record of Unsatisfactory Performance /Conduct	Removal from Panel at lawyer's request	Removal from Panel by LAD	Pending
2002/2003	14	3	2	8	1	0	0
2003/2004	7	1	1	4	0	0	1
2004/2005	7	0	2	3	0	1[22]	1
Total	**28**	**4**	**5**	**15**	**1**	**1**	**2**

Source: LAD

[20] To be given by a section head.

[21] LAD is satisfied with lawyers' explanation.

[22] Case also referred to the Law Society.

During this period, LAD referred one case to the Law Society. No referral had ever been made to the Bar Association.

4

CASE STUDIES

4.1 In criminal proceedings involving personal liberty of the accused, the prosecution usually sets the pace for the proceedings under the eye of the court. We focus, therefore, on the progress of legally aided civil cases. Below are the statistics for the past three years:

Year	**Cases completed**	**Time taken in years**				
		Less than 2	**2 to 3**	**3 to 4**	**4 to 5**	**over 5**
2002/03	8,229	5,940	1,114	470	307	398
2003/04	7,730	5,991	881	382	231	245
2004/05	5,950	4,608	799	220	114	209

Source: LAD

4.2 We have analysed a number of cases with the aided persons' consent. A selection of seven cases is summarised below for illustration.

Case 1

4.3 Legal aid was granted in January 1999 to claim damages for personal injury. In August 1999, the assigned lawyer proposed to instruct counsel. LAD disapproved the first nominee for lack of relevant experience and asked for another nomination with experience in personal injury cases. LAD again disapproved the second nominee. Upon confirmation by the assigned solicitor that the second nominee had handled over 16 personal injury cases of which ten were legally aided, LAD approved his nomination.

This case shows that LAD staff was not fully acquainted with the experience of Panel lawyers.

Case 2

4.4 Legal aid for divorce proceedings was granted to the wife. Eventually, the marriage was dissolved in May 2002 and the court awarded a settlement of some $94,000 to her. This sum was retained by LAD under the first charge. LAD reminded the assigned lawyer to submit the bill of costs in

December 2002, March and June 2003. It was finally submitted in June 2003, some 13 months after the order was made.

4.5 Although the court had ordered the husband to pay the legal costs, he was a welfare recipient unable to pay. LAD informed the wife that the legal costs charged by the assigned lawyer were assessed to be about $178,000. As recovery from the husband was unlikely, the wife was required to pay all legal costs. The money retained under the first charge was used to settle the accounts.

4.6 As the assessed legal costs far exceeded the money recovered, the aided person was reluctant to consent. Eventually, LAD managed to obtain her consent and the legal certificate was subsequently discharged. In the end, she received nothing from the litigation.

This case highlights the need for LAD or the assigned lawyer to explain clearly to aided persons and to remind them of the implications of the first charge to avoid raising false hopes in them.

Case 3

4.7 In 1993, the plaintiff lost a limb in an accident. In August 1996, he obtained legal aid to claim damages for personal injury.

4.8 In January 2000, the plaintiff had a new prosthetic limb. The proceedings were then adjourned to allow for rehabilitation, so that the parties could better assess the extent of damages. In May 2000, the plaintiff received $500,000 in interim damages.

4.9 In July 2000, LAD requested a progress report from the assigned lawyer and was told that rehabilitation was still in progress. LAD wrote again in November and December 2000. The assigned lawyer advised in January 2001 that rehabilitation programme had been completed and proceedings would be restored shortly.

4.10 LAD chased the assigned lawyer for progress and wrote to him in March, May and August 2001 but all in vain. In October 2001, the assigned lawyer telephoned LAD, promising a written reply within two weeks but again failed to deliver. LAD wrote in March, April and September 2002, telephoned in September 2002 and then wrote again in October 2002. The assigned

lawyer informed LAD in November 2002 that he had just restored the proceedings.

4.11 After rounds of negotiation, the case was settled at some $6.3 million. During the subsequent negotiations with the other party, the aided person refused to accept the sum offered for settlement. LAD considered that it was unreasonable in the circumstances for the aided person to receive legal aid. The aided person was required to state reasons why the legal aid certificate should not be discharged. Eventually, the aided person accepted the increased offer by the defendant. In December 2004, the legal aid certificate was discharged.

LAD did not intervene even when the assigned lawyer had not responded for nearly two years to ten repeated requests or reminders for progress reports. However, subsequent intervention shows that LAD can take proactive control of a case.

Case 4

4.12 The plaintiff was injured in an accident in 1992. He was

granted legal aid in November 1994. The case was settled for $750,000 in December 1999.

4.13 In January 2001, LAD asked the assigned lawyer for progress in finalising the accounts for legal costs and disbursements. Receiving no reply, LAD issued a reminder in February 2001. The assigned lawyer explained that there was an outstanding issue, which was subsequently resolved in March 2001. LAD wrote in June, July, August and December 2001 to check progress. Receiving no reply, LAD raised a number of questions about the legal costs by letter in March 2002. Meanwhile, the aided person urged LAD to release the balance of compensation to him.

4.14 Subsequently, LAD wrote the assigned lawyer again in August, October, November and December 2002, January and September 2003. In the letter of September 2003, LAD pointed out that it had been waiting for a reply for over one-and-a-half years and that the case had "dragged on unnecessarily for an incredibly long time". Still receiving no reply, LAD issued two further reminders in November 2003, threatening to report to the Law Society. Finally in December 2003, the assigned lawyer answered. The case was eventually concluded and legal aid certificate was discharged in November

2004.

This again shows that despite its frustration with the lack of response to some 15 requests or reminders over almost three years, LAD did not take earlier and firmer action against the assigned lawyer in accordance with its Operation Manual.

Case 5

4.15 The aided person was granted legal aid for divorce proceedings in October 1997. The assigned lawyer reported to LAD in November 1997 that he had interviewed the aided person and was awaiting her further instructions. LAD wrote to the assigned lawyer in February, April and August 1998 and learned that there had been no progress. In October 1998, LAD warned him that the matter would be reported to DMC if there was further delay. The assigned lawyer replied in early November 1998 that the other party would not contest and wished to reach an agreement on costs.

4.16 By March 2000, a number of orders had been made by the court.

LAD asked the assigned lawyer in April, May, July and August 2000 for copies of all the orders, but to no avail. In December 2000, LAD wrote directly to the court for copies.

4.17 As the assigned lawyer continued to fail to report progress, LAD had to write to the court again in March 2001 for copies of documents filed after December 2000. Finding a number of discrepancies and gaps in the court documents, LAD wrote in April, May and July 2001 to seek clarification from the assigned lawyer. The assigned lawyer was not able to give a clear reply. On 22 August 2001, LAD demanded a reply on certain outstanding issues within the day. The assigned lawyer then managed to give a substantive reply.

4.18 The legal aid certificate was not discharged until January 2005, because the assigned lawyer's practice was taken over by the Law Society in January 2002. LAD noted that it had taken four years for the assigned lawyer to complete this case and that the court documents were messy.

The case had dragged on unnecessarily. LAD did not take firm action even when the assigned lawyer continued to ignore its repeated requests despite

LAD's threat of referral to DMC.

Case 6

4.19 In 1998, the aided person was injured in an accident and eventually died in 2001 after much suffering.

4.20 Action to claim damages for personal injury commenced in 2000. After the death of the aided person, her sister as executrix of the estate took over the action and obtained legal aid in September 2001. In June 2002, counsel instructed by the assigned lawyer assessed the damages to be about $860,000, with a good prospect (60%-80%) of achieving it. The assigned lawyer informed LAD of the estimated costs: apart from $363,000 already incurred, a further $417,000 was required for a three-day trial, thus totalling $780,000.

4.21 When the trial set for October 2002 was about to begin, the parties settled in the sum of $150,000.

4.22 In April 2003, while waiting for the other party to pay the legal

costs according to the court order, the assigned lawyer asked LAD to help ease his cash flow. Based on a bill of about $1 million in legal costs[23], LAD advanced about $136,000 to the assigned lawyer, to be repaid from costs recovered from the other party.

4.23 Including some disbursements, the assigned lawyer owed LAD about $319,000 on this case. In March 2004, LAD asked for repayment. After nine reminders, the assigned lawyer responded in October 2004, claiming financial difficulties. He enclosed a cheque of $50,000 and asked for approval to repay by instalments.

4.24 In November 2004, the assigned lawyer repaid a further $50,000 and then failed to make any further repayments. In December 2004, LAD threatened recovery action. The assigned lawyer promised to pay in January 2005 but then absconded. In this event, the aided person (i.e. the executrix of the estate) was unable to receive any money because the damages so recovered had been held by LAD under the first charge.

In the end, the aided person did not benefit from the legal proceedings. LAD

[23] Subsequently after taxation, the costs were reduced to about half a million.

had allowed the assigned lawyer too long to finalise and clear the accounts after settlement. It wasted time over numerous reminders and did not spark even on the assigned lawyer's indication of financial difficulties.

Case 7

4.25 A woman was granted legal aid in April 1997 to petition for divorce. In October 1998, the marriage was dissolved and the husband ordered to pay about $35,000 in legal costs.

4.26 He ignored the demand for payment and disappeared. LAD tried to locate him in May 1999 and found him in August 1999. Facing financial difficulty, he agreed to repay by 71 monthly instalments of $500 each. In the ensuing 13 months, LAD issued six reminders and received 11 instalments.

4.27 The husband moved again but was located in December 2000. After paying several instalments, he again stopped payment. As of June 2002,

six instalments were outstanding. Thereafter, he paid only a few more instalments. By September 2004, only 31 out of the 60 instalments due had been paid since his agreement to pay by instalments.

4.28 In a letter of September 2004, LAD threatened legal proceedings in which the husband might be imprisoned for contempt of court. Receiving no response, LAD considered the chances of recovering further money slim and decided to write off about $16,800 due from the husband. The legal aid certificate was discharged in December 2004.

LAD was reluctant to take legal action to enforce judgment. Making empty threats impairs its own credibility.

General Observations

4.29 These case studies show that LAD guidelines, though well formulated in theory and on paper, are not always enforced in practice. Clearly in these cases, LAD's guidelines and actions have failed to protect the aided persons' interests or guarded the public purse. LAD is evidently

reluctant to take firm action. DMC also seems ineffective as a deterrent to incompetent and/or ineffectual assigned lawyers.

LAD's Comments

4.30 A copy of its comments on these case studies is at **Annex 3**. The main points are summarised below:

Case 1: With the setting up of the Case Management and Case Accounting System in late 2002, assignment history of lawyers on the Legal Aid Panels can be readily retrieved now.

Case 2: LAD and the assigned lawyer had on numerous occasions explained to the aided person the operation, effect and status of the first charge.

Case 3: No major step in the proceedings would be taken until the medical condition of the aided person had been

stabilised.

Case 4: The assigned lawyer was subsequently placed on the Record of Unsatisfactory Performance.

Case 5: An evaluation report had been made on the assigned lawyer's unsatisfactory performance for submission to DMC. By then, the assigned lawyer's practice had been taken over by the Law Society.

Case 6: No Panel lawyer had practised fraud on LAD and absconded before. Absconding in this case could not have been reasonably foreseen.

Case 7: It was not cost-effective to take enforcement proceedings in view of the small amount of costs overdue.

Our Response

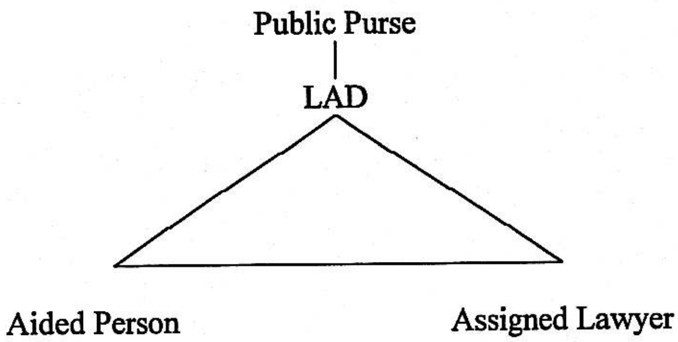
4.31 The case studies in this Chapter are to illustrate areas for improvements. LAD has not disputed the accuracy of the facts set out. We note LAD's comments on the justifying or mitigating circumstances. Our final remarks are in Chapter 7.

5

OBSERVATIONS AND OPINIONS

A TRIPARTITE RELATIONSHIP

5.1 We see a tripartite relationship among LAD, the aided person and the assigned lawyer.



As with any other Government department, LAD provides a pubic service, specifically to aided persons. The assigned lawyer is accountable to LAD under the provisions of the Legal Aid Ordinance and Regulations and the Legal

Aid in Criminal Cases Rules. The relationship between the assigned lawyer and the aided person is governed by these statutory provisions as well as the conventional lawyer-client obligations.

5.2 We are well aware of the judgment in the *Ngao To-ki* case (para. 3.15). This investigation does not examine the legal or professional duty of LAD to aided persons. Our focus is on LAD's duty in its administration of the legal aid services. In our view, good administration carries an inherent element of monitoring of progress and reviewing for improvement. This must be so for any Government department providing public services.

5.3 LAD sees itself as a custodian of public funds and, therefore, a guardian for value for money of its services. Rightly so! We appreciate its role as such and recognise this as being essentially within the purview of the Audit Commission[24]. However, whichever way one looks at it, LAD cannot be absolved from its inherent duty to monitor the progress of assigned-out cases and the performance of assigned lawyers.

5.4 We consider LAD to have **administrative accountability** for the

[24] The Director of Audit's Report No. 37, October 2001, is relevant.

efficient and cost-effective operation of the legal aid schemes. This carries an inherent obligation to the aided person as a service department.

FIRST CHARGE

5.5 The first charge safeguards public funds by ensuring that LAD does not have to pay the legal costs of a successful litigant. This is fair and reasonable.

5.6 From complaints received, we note that many aided persons are unaware of or have difficulty understanding the first charge and its implications. Time and again, the aided person is puzzled and frustrated not to recover anything even though the judgment is in his favour and damages are awarded by the court or settlement has been reached (e.g. Cases 2 and 6). There is a need for LAD to consider what more can be done to make aided persons understand better the operation of the first charge and its implications.

MONITORING OF CASES

Monitoring

5.7 We consider that LAD has placed undue emphasis on the *Ngao To-ki* judgment (para. 3.15) in limiting its duties to the letter of the law.

5.8 LAD, as a Government department, has a duty not just to ensure value for public funds, but also to provide quality service to aided persons as well. A poor performing assigned lawyer cannot be good value for public money or effective advocate for an aided person.

5.9 Government departments may contract out their services, but not the accountability for the quality, efficiency and effectiveness of such services. In addition to the statutory provisions (para. 5.1), there is virtually a contractual relationship between LAD and the assigned lawyer even though no formal contract openly binds the assigned lawyer to discharge his duties or requires LAD to monitor his performance. In comparison, if delay or incompetence is detected among staff, LAD would be expected by the Administration and the public to take remedial action. We consider that there is a need for LAD to

accord a similar degree of responsiveness and responsibility for assigned lawyers in relation to aided persons.

"Bring-up" Mechanism

5.10 Regulation 12(9) of the Legal Aid Regulations provides that the assigned lawyer has to report to DLA on progress and disposal of proceedings (para. 3.16 and **Annex 1**). LAD's detailed guidelines on when to bring up case files for review (para. 3.17) provide a framework for the monitoring of progress. It is good practice to ensure that all cases receive timely attention. However, the actual practice of some officers leaves much to be desired, as illustrated by our case studies.

Progress Report

5.11 After reviewing case files, individual officers have a great deal of latitude in deciding whether or not to call for progress reports. In Case 3, the officer concerned decided to wait six months before requesting progress report pending the aided person's rehabilitation. This is understandable. However, the subsequent lack of action against the assigned lawyers for failing to respond

for two to three years is totally inexplicable and inexcusable. In Case 4, the assigned lawyer simply ignored all 15 reminders and letters issued by LAD over almost three years. Far more positive and firmer action by LAD would have been in order.

5.12 In some cases, LAD staff did not seem to appreciate that their own acquiescence in the assigned lawyers' inertia would aggravate the aided persons' plight. In Case 2, the officer concerned issued his first reminder more than six months after the marriage of the aided person had been dissolved. He then waited for another three months before issuing a second reminder, yet another three months for the third reminder. By the time the assigned lawyer submitted the draft bill of costs, the case had been delayed for over a year.

5.13 Sometimes, there may be good reasons for deferring action during the proceedings, e.g. waiting for the injuries of the aided person to stabilize for a more accurate assessment of damages to be claimed (Case 3). However, there can be no justification for delays in finalising accounts of legal costs long after the judgement or requisite court order has been obtained (Cases 2, 4, 5 and 6). Clearly the repeated reminders issued by LAD officers point to the assigned lawyers' lack of progress in these cases. There should be in

place a system to ensure more effective and efficient post-judgment follow-up process, especially when LAD officers can detect delays that may be detrimental to the aided person's interests.

5.14 Monitoring by telephone or paper chase for progress reports is not good enough. Although the Operation Manual specifies that follow-up action should be taken where an assigned lawyer has ignored two reminders and a personal letter from LAD, not all LAD staff follow these instructions (Cases 3, 4 and 5). There is a need for LAD to review the current staff practice in compliance with the Operation Manual, to ensure that both the procedures and actual practices are effective in securing timely delivery of reports and early conclusion of cases.

5.15 Although internal guidelines provide for the replacement of unresponsive lawyers (paras. 3.18 and 3.20), the cases show that failure to respond for one-and-a-half years may not result in replacement.

Evaluation and Appraisal of Assigned Lawyers

5.16 LAD has an evaluation proforma for unsatisfactory performance by and on first assignment by assigned lawyers (**Annex 2**). We consider this arrangement commendable. However, the description of and criteria for unsatisfactory performance are too vague. A description such as "not showing adequate professional expertise" is open to interpretation and argument. The difference between "**unreasonable delay** (in conduct of proceedings)" and "**delay** (in resolving costs matters...)"; or between "**failure** (to report on progress ...)" and "**repeated failure** (to obtain DLA's prior approval)" is not clear. This may result in disparity among LAD officers in deciding whether to initiate an evaluation report. A chronology of events would give a clear picture of the case. Defined **trigger points** would help to identify possible problems and ensure a clearer and more consistent approach amongst staff in evaluation on unsatisfactory performance (para. 5.26).

5.17 Meanwhile, the key question is what should trigger an evaluation report, and when. For about 26,000 assigned-out cases in the past three years (para. 3.6), there were only 28 unsatisfactory evaluation reports and two removals from the Panel (one of them voluntary). Only one case was referred to the Law Society (para. 3.24).

5.18 Legal aid cases are an important source of income for some, probably many, lawyers. In 2004/05, assigned-out civil cases incurred expenditure of $285 million and criminal cases $82 million (paras. 1.1 and 3.6).

5.19 Some aided persons who have not made a nomination rely on LAD to choose competent lawyers for them. However, given the large number of lawyers on the Panels (para. 3.5), it is impossible for LAD officers to be fully acquainted with the strengths and weaknesses of all lawyers on the Panels (Case 1). This may result in inappropriate assignments.

5.20 In this connection, we note that judges had on occasions criticised the performance of some assigned lawyers as "a waste of public funds". In August 2003, Mr Justice Conrad Seagroatt was reported as commenting on the skills of some assigned lawyers, "the Legal Aid Department ... assigns cases to ... lawyers who don't know their backsides from their elbows when it comes to personal injury litigation ... (It) must ... instruct only those who are competent ..."[25]

5.21 At present, unsatisfactory evaluation reports are few and far

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[25] *South China Morning Post* 25 August 2003.

between in proportion to the volume of assigned-out cases (para. 5.17). More stringent standards should be exercised in evaluation.

5.22 To ensure that aided persons are properly served and public funds properly used, we consider that the current "negative" evaluation should continue but be supplemented by some appraisal system under the supervision of DMC for an overall grading of individual assigned lawyers on conclusion of a case. To avoid burdening LAD, it should be effective and efficient yet simple. The information gathered will gradually complete LAD's database on both the specialisation and performance of lawyers on the Panels. This will help LAD and aided persons in making a nomination (paras. 3.8 and 3.10).

Intervention by LAD

5.23 In Case 6, we note that LAD did not query or intervene even in the face of the sequence of curious events outlined in paras. 4.19 to 4.24.

5.24 The evidence that the assigned lawyer was in financial trouble was crystal clear with his admission by letter of October 2004 (para. 4.23). It

is surprising that even then LAD did not act.

5.25 Solicitors are often entrusted with their clients' money, so their personal integrity and financial soundness are of paramount importance. The Law Society requires that "where a solicitor has reason to believe that another solicitor is in financial difficulty ... he should report ... to the Council"[26].

5.26 The assigned lawyer first hinted at his cash flow problem in April 2003 and eventually absconded in January 2005. Had LAD been more alert and acted promptly, the fortunes of the aided person would have been different. Surprisingly, LAD chose to be sympathetic with the assigned lawyer instead. It was both an unfair blow to the aided person, who was then unable to recover anything (para. 4.24), and a sheer waste of public funds. There is a need for LAD to review its guidelines on when, and how, to intervene or re-assign in case the assigned lawyer shows signs of incompetence or financial difficulty (Cases 5 and 6; also para. 5.17).

5.27 In case of professional misconduct, LAD may report to the two legal professional bodies (para. 3.21). However, only one report has been

[26] *Professional Guide*, para. 11.03 *Duty to Report Misconduct*, Law Society of Hong Kong.

made in the past three years (para. 3.24). We consider the current guidelines too vague and LAD practice too lax.

Enforcement of Judgments

5.28 In Case 7, LAD had followed up for five years only to obtain partial payment, with the remainder having to be written off. LAD should be ready to take firm action to enforce judgments. In particular, it should institute legal proceedings after due warning has been given. Otherwise, not only does the aided person not get his due, the credibility of Government and indeed the judicial system could be placed at stake.

VIEWS FROM LEGAL AID SERVICES COUNCIL

5.29 Problems were first identified by an inter-departmental Working Group to Review the Monitoring of Assigned-out Cases set up by the Administration in December 1997 to study LAD's monitoring system[27]. It

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[27] The Working Group was set up in view of the substantial amount of public money spent on assigned-out cases and rising public expectations on the quality of legal aid services. It was chaired by DLA and comprises representatives from the Finance Bureau and the

recommended numerous improvement measures, many of which were for the medium to long-term[28]. In October 1998, LASC set up a working party to follow up the measures. In January 2003, the Interest Group on Assignment System and Monitoring of Assigned-out Cases under LASC recommended that LAD should draw up checklists for use by assigned lawyers to standardise the procedures for progress reports. The interest group even produced a sample checklist for LAD's consideration.

5.30 Regrettably, despite earnest supervision for almost a decade, efforts by LASC seemed to have made little impact on the monitoring of assigned lawyers. LAD refused to draw up checklists for use by assigned lawyers, because it considered that once a case is assigned, the conduct of the proceedings should be left to the assigned lawyers. LAD considers that experienced lawyers should know how to monitor the progress of cases. Unfortunately, the reality (as illustrated by the case studies) proves otherwise.

5.31 We respect the legal professions and the concept of

Administration Wing of the Chief Secretary for Administration's Office.

[28] Such as the introduction of mediation in matrimonial cases and the introduction of conditional fee arrangements. For details, see *LASC Annual Report 1999/2000*, p.p. 46 to 63.

self-regulation. However, for responsible administration, there is a need for LAD to re-orientate its mentality and approach as an agent for public service. For proper accountability for its administrative role in monitoring assigned-out cases, a checklist for use by assigned lawyers is essential tool for conscientious scrutiny.

CONCLUDING REMARKS

5.32 Legal aid ensures access to justice for those who cannot afford the legal costs. Once granted legal aid, the aided person is protected from liability for legal costs if he loses the case. However, LAD's present operation of the scheme does not assure compensation to aided persons even with a favourable judgment.

5.33 Case 6, where the aided person did not benefit at all, raises questions:

(a) Should public funds be used to finance litigation where the aided person does not benefit at all?

(b) Should an assigned lawyer be allowed to drag out a case for higher legal costs?

5.34 Given the thousands of cases assigned out every year, we accept that it is unreasonable and unrealistic to expect LAD to monitor each and every case closely. We also take LAD's point about leaving matter to the assigned lawyer's professional processing. However, that must not mean leaving matters to the assigned lawyer only. We also consider the degree of latitude given to LAD staff in monitoring the performance of assigned lawyers far too wide. Realistic standards and consistent criteria for monitoring should be put in place **and** in practice. The current monitoring mechanism verges on being a paper exercise, chasing for the sake of completing file records without firm attempt to secure results or to appraise performance.

6

RECOMMENDATIONS

6.1 A fundamental change is called for in LAD's concept of and approach to monitoring of legal aid cases. The practices of LAD staff in monitoring the performance of assigned lawyers should be tightened.

6.2 On the basis of our findings, The Ombudsman makes the following recommendations to DLA:

First Charge

(1) to explain clearly in simple layman terms to legal aid applicants the operation and implications of the first charge and then, direct or via assigned lawyers, from time to time of the implications (para. 5.6);

Monitoring

(2) to review and re-orientate the staff mentality in monitoring the performance of assigned lawyers (paras. 5.7 to 5.9, 5.31);

(3) to consider a more formal "contractual" arrangement with assigned lawyers to facilitate LAD's effective monitoring of their performance in discharging their duties (para. 5.9);

Progress Reports

(4) to remind staff not just to issue timely requests and reminders for progress reports but also to set reasonable limits on the number of such reminders after which to escalate supervisory action (paras. 5.11 to 5.15);

(5) to develop more effective means to ensure assigned

lawyers' timely delivery of progress reports and early conclusion of cases (paras. 5.11 to 5.15);

(6) to revise procedures to ensure timely completion of post-judgment action, e.g. settlement of accounts (paras. 5.11 to 5.15);

(7) to review procedures to make for effective and flexible sanction against unresponsive and irresponsible lawyers instead of making empty threats of referral to DMC (paras. 5.11 to 5.15);

Evaluation and Appraisal of Assigned Lawyers

(8) to identify trigger points for evaluation of unsatisfactory performance of an assigned lawyer (para. 5.17);

(9) to supplement this by an effective and efficient yet simple appraisal system under the supervision of DMC

(e.g. award of an overall grade to assigned lawyers upon conclusion of cases) (paras. 5.21 to 5.22);

Intervention by LAD

(10) to review guidelines to specify the circumstances under which officers should intervene or re-assign cases (para. 5.26);

(11) to review guidelines to specify the circumstances under which officers should refer cases to the two professional bodies for further investigation (para. 5.27);

Enforcement of Judgments

(12) to strengthen the current arrangements to enforce judgments and to institute legal proceedings for contempt after warning has been given (para. 5.28);

Checklists

(13) to re-consider the idea of checklists for use by assigned lawyers proposed by the Interest Group of LASC (para. 5.31);

Administration of Legal Aid Services

(14) to consider ways to enhance the effectiveness of LASC with effective monitoring (para. 5.30).

7

FINAL REMARKS

COMMENTS FROM LAD

7.1 A copy of LAD's general response and comments on the case studies is at **Annex 3.** Its proposed textual amendments have been incorporated where appropriate.

7.2 In addition, LAD has provided us with a very detailed response to our observations and comments. Particularly, LAD points out that a balance must be struck between the need to monitor assigned-out cases and to sanction under-performance, and the need to entrust the assigned lawyers with the responsibility and latitude to conduct the cases according to their professional judgment. In striking the balance, LAD considers the following factors:

(a) Lawyers whose performance falls below standard may

face professional claims by clients;

(b) It is not for LAD to intervene or interfere with the conduct of proceedings by the assigned lawyers;

(c) Excessive or tedious reporting will unduly increase legal costs;

(d) Re-assignment will incur additional costs and should not be taken lightly;

(e) Before making a referral to the professional bodies, LAD has to satisfy itself that the unsatisfactory performance amounts to professional misconduct.

7.3 On some of our observations/recommendations, LAD has given comments as follows:

(a) First charge – It is already the existing practice of LAD to explain the operation and implications of the first charge to the aided persons through various means, including posters, pamphlets, video and notes on application forms and letters. The Ombudsman is invited to re-consider her observations on the aspect of

the first charge.

(b) Monitoring - There is no contractual relationship between LAD and the assigned lawyers. However, it does not affect its ability to monitor the progress of assigned-out cases and the performance of assigned lawyers. LAD has reservations about the effectiveness of a "formal contractual arrangements" with the assigned lawyers.

(c) Evaluation and appraisal - Awarding an overall grading to each assigned lawyer upon conclusion of each case is practically difficult to introduce as shown by the experience of the Law Society.

(d) Checklist – It would be difficult to design a checklist for all assigned-out cases because the nature and circumstances of the cases are different. Nevertheless, LAD has in recent years introduced checklists for major type of cases for use by its own

staff to facilitate monitoring.

COMMENTS FROM LASC

7.4 LASC's suggested textual amendments have been incorporated where appropriate. It points out that LASC does not study legal aid case files, because of the secrecy provisions under the Legal Aid Ordinance and the Personal Data (Privacy) Ordinance. It has, therefore, relied on other measures of supervision, while day-to-day management remains the responsibility of LAD.

7.5 LASC appreciates our concern over effective monitoring of assigned-out cases and will continue to make efforts to improve governance.

FINAL REMARKS FROM THE OMBUDSMAN

7.6 The Ombudsman notes LAD's comments. She maintains that LAD has a responsibility to ensure appropriate service to aided persons as well

as efficient and cost-effective utilization of public funds by assigning cases to competent lawyers. This duty is succinctly stated by the Chief Justice in his address at the Opening of the Legal Year 2006 on 9 January 2006:

> "The Legal Aid Department has a duty to ensure that [legal aid] funds are well spent and value for money is obtained. In particular, it has to exercise sound judgment in assigning cases so that counsel and solicitors of appropriate competence are instructed".

The Ombudsman shares this view.

7.7 On LAD's general response and comments, The Ombudsman recognises the need to strike a balance between "the need to monitor assigned-out cases and sanction the under-perform, and the need to allow the assigned lawyers to conduct the cases relying on their professional judgment". However, the question is where and when to draw the line. For a monitoring system to be efficient and effective, there must be some points in the conduct[29] of the assigned lawyer to trigger possible intervention and perhaps even sanction. Failure to respond to 15 reminders or requests across almost three

[29] Including case handling and professional conduct.

years (Case 4) should have triggered earlier and firmer action. Otherwise, what is the point of putting in place arrangements to request progress reports?

7.8 On LAD's specific comments in para. 7.3, The Ombudsman has the following remarks:

(a) Our observations on the first charge were made from complaints handled by this Office. LAD has indeed made much effort to explain the first charge. However, the fact remains that some aided persons do not understand it. We commend LAD for the efforts made, but nevertheless recommend that it gives further thought on what more can be done.

(b) There is a need for formal "contractual" arrangements with assigned lawyers to facilitate LAD's effective monitoring.

(c) Overall grading is a suggestion for LAD on how to

implement our recommendation of setting up a simple appraisal system. The LAD subject officers should have the professional experience and judgment to make an evaluation of the assigned lawyers' performance. It may be difficult to appraise all assigned lawyers at once. LAD may start the system by asking DMC to agree on a benchmark for its officers to make consistent evaluations.

(d) We note that LAD has already introduced checklists for its own staff. Again, we are not asking LAD to introduce the checklists for all its assigned-out cases at once. As a suggestion, LAD may consider gradual introduction by phases.

7.9 We will ask LAD for progress reports in the implementation of our recommendations.

7.10 In conclusion, The Ombudsman thanks DLA and his staff for assistance throughout this investigation. She also thanks LASC for providing

us with its views.

FOOD FOR THOUGHT

7.11 Apart from highlighting the inadequacies in LAD's monitoring of assigned-out cases, this exercise has also identified the apparent lack of monitoring over the professional standard of the legal professions. In some of the cases we studied, certain steps taken, or missed, by lawyers in the proceedings were clearly not in the best interests of their clients. Unless such practices amount to professional misconduct, the only course of action available to such clients is to bring a lawsuit for professional negligence. This is a costly option which is not without risks. In essence, the client would have to find another lawyer who is prepared to accept his case and risk the high costs of litigation. It is perhaps no accident that such lawsuits are far and few between.

7.12 The Chief Justice has recently raised the question of "appropriate competence" among counsel and solicitors (para. 7.6). In this context, The Ombudsman notes that the two legal professional bodies refer in their code of

conduct to their members having "a duty to be competent" in their professional services. However, it is not obvious to those outside the legal professions how current arrangements for monitoring professional competence work. There is, therefore, a need for the two legal professional bodies to explore, perhaps in consultation with the Administration, how best to promote awareness, and enhance the effectiveness, of such mechanism.

---- End ----

Office of The Ombudsman
Ref. OMB/DI/135
January 2006

Chapter:	91A	Title:	LEGAL AID REGULATIONS	**Annex 1** **(para. 3.16)**
Regulation: 12		Heading:	**Conduct of proceedings by solicitors**	Version Date: 03/07/2000

(1) Every set of papers, whether delivered by the Director to a solicitor or to counsel or by a solicitor to counsel, shall be marked "Legal Aid" or "法律援助". (L.N. 326 of 1984; 32 of 2000 s. 48)

(2) Where it appears to the aided person's solicitor necessary for the proper conduct of the proceedings to take or to apply to the court for leave to take any one or more of the following steps, namely-

(a) to add any further party to the proceedings; or
(b) to bespeak any transcript of shorthand notes of any proceedings; or
(c) to lodge any interlocutory appeal; or
(d) to instruct more than one counsel; or
(e) to set up or set off any right or claim having the same effect as a cross-action (other than a counter-claim or set-off arising out of the same transaction and capable of being pleaded as a defence), or to reply to any right or claim so set up or so set off by any other party; or
(f) to file any counter-claim, cross-petition or cross-appeal; or (L.N. 235 of 1988; L.N 147 of 2000)
(g) to represent the aided person at an inquest into the death of a person under the Coroners Ordinance (Cap 504) which gives rise to the proceedings to which the certificate relates, (L.N. 147 of 2000)

he shall (unless the certificate provides for the act in question to be done) apply to the Director for authority so to do, and no payment shall be allowed on taxation for any such step taken without the approval of the Director.

(3) The Director may give general authority to solicitors acting for aided persons in any particular class of case to obtain experts' opinion and to tender expert evidence, and if so he shall state the maximum fee to be paid for any report or opinion or expert witness.

(4) Where it appears to an aided person's solicitor necessary for the proper conduct of the proceedings either-

(a) to obtain a report or opinion of one or more experts or to tender expert evidence in a case of a class not included in any general authority under paragraph (3); or
(b) in a case of a class so included, to pay a higher fee than that stated by the Director or to obtain more reports or opinions or to tender more experts as witnesses than have been authorized,

he may apply to the Director for authority so to do and if the Director gives authority he shall state the maximum number of reports or opinions that may be obtained or the maximum number of persons who may be tendered to give expert evidence and the maximum total fee to be paid therefor.
(5) Save as provided by this regulation, no payment shall be made for the report or opinion of an expert or for expert's evidence tendered by or on behalf of an aided person.
(6) Where it appears to the aided person's solicitor necessary for the proper conduct of the proceedings for an act to be done, but that act is either unusual in its nature or involves unusually large expenditure, he shall request the Director's prior approval of the act, and, where such prior approval has been obtained, no question as to the propriety of the act shall be raised on taxation as between solicitor and client. (L.N. 326 of 1984)
(7) Without prejudice to the right of solicitor or counsel to give up a case for good reason, any solicitor or counsel may give up an aided person's case if, in his opinion, the aided person has required the proceedings to be conducted unreasonably so as to incur an unjustifiable expense to the Director or has required unreasonably that the proceedings be continued.
(8) Where any solicitor or counsel exercises the right to give up an aided person's case-

(a) under the provisions of paragraph (7); or
(b) on the ground that the aided person has wilfully failed to provide the information to be furnished by him or in furnishing such information has knowingly made a false representation,

the solicitor or counsel shall make a report to the Director of the circumstances in which that right was exercised.
(9) An aided person's solicitor shall give the Director such information regarding the progress and disposal of proceedings to which the certificate relates as the Director may from time to time require for the purpose of performing his functions under the Ordinance and without prejudice to the generality of the preceding words, a solicitor who has acted or is acting for an aided person, on being satisfied that the aided person has died or has had a receiving order made against him, shall report the facts to the Director.
(10) A solicitor shall not be precluded, by reason of any privilege arising out of the relationship between solicitor and client from disclosing to the Director any information or from giving any opinion which may enable the Director to perform his functions under the Ordinance.
(11) The Director may at any time, while a certificate is in force, pay to the aided person's solicitor such sums as the Director may approve for disbursements to be made by the solicitor in respect of the proceedings to which the certificate relates. Where such approval is obtained, no question shall be raised on taxation as between solicitor and client as to the propriety of any disbursements made in accordance with such approval. (L.N. 56 of 1967)

Annex 2 (para. 3.19)

Note: The following points are extracted from the proforma on which performance appraisal is done.

I. Performance evaluation on assigned counsel in civil cases –

Aspects of performance considered unsatisfactory:

- not showing adequate professional expertise in law, procedures or judgment;
- poor advocacy in court;
- failure to properly prepare the case for court hearing;
- serious delay in furnishing advice/draft documents to the assigned solicitor;
- failure to refund over-payment of counsel's fees; and
- any complaints received which have been substantiated.

II. Performance evaluation on assigned solicitor in civil cases -

Aspects of performance considered unsatisfactory

- not showing adequate professional expertise in law, procedures or judgment;
- unreasonably delay in conduct of proceedings;
- failure to report on progress to LAD in accordance with Regulation 12;
- delay in resolving costs matters after conclusion of main proceedings;
- failure to protect DLA's first charge;
- failure to report abuse of legal aid in accordance with Regulation 12;
- repeated failure to obtain DLA's prior approval; and
- any complaints received which have been substantiated.

Legal Aid Department's Response
to the draft Ombudsman's Investigation Report on
Monitoring of Assigned-Out Cases

Annex 3
(para. 7.1)

GENERAL RESPONSE

The Director of Legal Aid (DLA) is grateful to The Ombudsman for completing the investigation and the Report. The Legal Aid Department (LAD)'s vision is to be a cornerstone of the rule of law in Hong Kong by delivering quality legal aid services. We are committed to ensuring that no one who qualifies for legal aid is denied access to justice because of a lack of means; to maintaining the highest standards of professional excellence and ethic; working in partnership with the legal profession to reach our vision, and anticipating and meeting the ever-changing needs of the society. We have endeavoured to make continuous improvements to the delivery of our service, including through the monitoring of assigned-out cases and we will continue to do so.

2. In the case of *Ngao To-ki vs. The Attorney General (the Ngao case)*, Mr. Ngao, an aided person, sued his assigned solicitors as well as the DLA for negligence. As against the DLA, Mr. Ngao's allegations included:

> *The DLA owed him a contractual duty and/or fiduciary duty and/or a general duty of care in respect of the continuation and conduct of the proceedings in the action.*
>
> *The DLA was in breach of those duties in that he, amongst other things, had allowed the assigned solicitors unreasonably to delay the conduct of the proceedings.*
>
> At the first instance, the trial judge dismissed Mr. Ngao's claim against the DLA. Mr. Ngao appealed against that decision and his appeal was dismissed by the Court of Appeal unanimously.

3. While the Court of Appeal's decision in the *Ngao case* has clarified that the principal duty cast upon the Director by the Legal Aid Ordinance "*is to*

see that the legal aid scheme is competently managed so that public funds are not wasted", we have to emphasize that LAD attaches equal importance to serving and safeguarding the interest of the aided persons. To meet these objectives, we have in place an elaborate system for allocating and monitoring legal aid assignments to lawyers, including the introduction of procedures to consider reports of unsatisfactory performance of assigned lawyers, and the necessary measures needed in response to the reports in 1997 by the Departmental Monitoring Committee (DMC). Actions including the issue of warning letters, entry into the Record of Unsatisfactory Performance/Conduct, removal from the relevant Legal Aid Panel, and re-assignment of cases to other lawyers etc are taken depending on the circumstances of individual cases (there were 27 cases in the past 3 years in which LAD has reassigned the cases to other lawyers as a result of the assigned lawyers' delay or unresponsiveness). We have in the past even granted legal aid to aided persons to sue the assigned lawyers for professional negligence. As with all systems, we recognize that there may be room for improvement in response to changing times. LAD will continue to, as an on-going process, review the system and introduce improvements where appropriate.

4. Notwithstanding the above, it is incumbent upon us to point out that a balance has to be drawn between the need to monitor assigned-out cases and to sanction under-performance, and the need to entrust the assigned lawyers with the responsibility and latitude to conduct the cases according to their professional judgment. The balance is a fine and delicate one and the following factors are of particular importance -

a) Once a case is assigned, the assigned lawyer is responsible for the conduct of the case and the conventional solicitor-client relationship begins. In the litigation arena, there are different tactics employed by litigators that may vary from person to person and from case to case depending on the professional judgment of the lawyer. The assigned lawyer is professionally qualified and his own conduct and discipline are governed by code of practice and guidelines of the professional body he belongs. Those whose performance falls below the standard of a reasonably competent lawyer may have to face professional negligence claims filed by their clients;

b) It is not the design of the LAD set-up nor is it the intent of the Legal Aid Ordinance for LAD to intervene or interfere with the conduct of

the case by the assigned lawyer. It is neither proper nor appropriate for LAD to intervene in the conduct of the case when it does not have at hand all its facts and documentation. There are costs implications for both the public purse and the aided persons if the assigned lawyers were asked to copy to LAD all documents involved and if LAD duplicates the efforts to monitor the proceedings or conduct of the assigned-out cases all the way;

c) The frequency and extent of progress reporting by assigned lawyers may vary according to the nature, complexity and actual progress of each case. Excessive or tedious reporting by assigned lawyers will lead to undue increase in the legal costs which may have to be borne by the aided persons;

d) A decision on re-assignment of lawyer due to unsatisfactory performance should not be taken lightly. LAD needs to give careful consideration to such important factors as the nature and gravity of the conduct under complaint, the stage of proceedings reached at the time (e.g. it would not be appropriate to re-assign the case when the proceedings have been concluded and the only outstanding matter is the finalization of accounts), all possible prejudice to the aided person, e.g. additional costs and time likely to be occasioned by the re-assignment and whether the aided person would consent to the re-assignment; and

(e) On possible report to the 2 legal professional bodies, LAD would need to be satisfied that the unsatisfactory performance amounts to professional misconduct on the part of the assigned lawyer, and that the aided person also consents to such a referral or report being made.

5. Against our basic premises as set out above, our specific comments on individual cases quoted in the Report are set out in the following section.

SPECIFIC COMMENTS

Chapter 3 Assigning Out

MONITORING OF CASES

Duty to Monitor

Paragraph 3.15 .

6. In line with the principle as laid down in the *Ngao* case, LAD's duty is to ensure that the aided proceedings are in progress, there are continued merits in the aided litigation, and to approve unusual expenses before they are incurred. To enable LAD to perform its duty, it requires, amongst other things, assigned solicitors to submit progress reports at appropriate intervals and to seek its prior approval on unusual expenses. Further to the above, as we have emphasized in paragraph 3 above, LAD attaches equal importance to serving and safeguarding the interest of the aided persons, and has accordingly put in place an elaborate system for allocating and monitoring legal aid assignments to lawyers. That said, a fine balance has to be drawn between the need to monitor assigned-out cases and sanction the under-perform, and the need to allow the assigned lawyer to conduct the cases relying on his professional judgment.

Chapter 4 Case Studies

Case 1 (paragraph 4.3)

7. The correct file reference should be . The case is about the administrative arrangements for assigning out legal aid cases.

8. Lawyers applying to join the Legal Aid Panel are required to advise LAD of their experience in terms of post admission legal practice as well as number and types of cases handled. LAD captures information on Panel Lawyers' experience in its computerized information system based on information provided by Panel Lawyers themselves, and the database enables LAD staff to verify if a particular lawyer has met the assignment criteria before making an assignment.

9. Experience of Panel Lawyers may improve over time and it is the responsibility of the lawyers to provide LAD with updated information that may make them become eligible for assignments. LAD reminds Panel Lawyers to provide it with updated information on their profile from time to time, in our Newsletter issued in 2002, on LAD's website and most recently by letters to the lawyers in 2005. If, notwithstanding the reminders, the lawyer does not update his experience with LAD, LAD can only assign cases based on the information already provided. Since the setting up of the CMACS in 2002, the assignment history of lawyers on the Legal Aid Panel can be retrieved readily.

10. Before the setting up of the Case Management and Case Accounting System (CMACS) in 2002, LAD's old computer system could not capture information on assignments made before the preceding 12 months. In this case, contrary to the Ombudsman's observation, LAD staff did check the record to see if the counsel proposed by the assigned lawyer met the assignment criteria; and the record showed that for that particular case, neither met the criteria. LAD thus made further enquiry with the assigned lawyer as to the second counsel's experience and upon receiving confirmation that the counsel's experience met LAD's assignment criteria, LAD assigned him as counsel of the case.

<u>Case 2 (paragraphs 4.4 to 4.6)</u>

11. The aided person was granted legal aid in February 2000 to seek divorce, custody and ancillary relief. The opposite party was also later granted legal aid to defend the parts of the proceedings relating to custody and ancillary relief at nil contribution. As regards the divorce itself, and an injunction taken out by the first aided person to restrain the opposite party from disposing of the proceeds of the former matrimonial home, the opposite party was not legally aided.

12. LAD and the assigned lawyer have taken the following steps to inform, explain and draw the aided person's attention to the DLA's first charge, its operation and implications:-

- The First Charge Pamphlet was sent to the aided person at the time when legal aid was offered to the aided person;

- The Offer of Legal Aid contained a clause relating to first charge;

- The aided person signed the Acceptance of Offer of Legal Aid to signify her acceptance of the terms of Offer, including the clause relating to the first charge;

- At the first interview, the assigned lawyer explained to the aided person the first charge and its implications;

- In May 2001, the assigned lawyer wrote to the aided person, reminding her of the first charge and explaining to her that any costs not recovered from the opposite party formed part of the first charge. The assigned lawyer also gave her an estimate of the legal costs already incurred;

- In December 2001, the assigned lawyer advised the aided person over the telephone of the first charge and an estimate of the legal costs already incurred;

- At a pre-trial conference in February 2002, the assigned lawyer advised the aided person of the costs incurred;

- At a hearing in February 2002, the assigned lawyer informed the Court of the amount of costs incurred in the presence of the aided person;

- In February 2004, LAD staff wrote to the aided person, reminding her that the assigned lawyer's costs would be deducted from the lump sum awarded to her;

- In March 2004, LAD staff explained to the aided person over the telephone the first charge and the costs involved.

13. It can be seen from above that LAD and the assigned solicitor have on numerous occasions explained, through written and verbal advice, to the aided person the operation, effect and status of the first charge, to avoid raising any false hope on the part of the aided person. Throughout the proceedings, there was no indication that the aided person did not understand the first charge.

She had not made any complaint concerning the first charge or the amount of costs involved. She did not give her written consent to the amount of costs immediately, since, as we understand it, she wished to defer her consent until after LAD had dealt with her application to extend her legal aid certificate to cover variation of the custody order.

14. The information and explanation on first charge are already expressed in simple layman language. Nevertheless, we will continue to use our best endeavours to inform the legal aid applicants and aided persons of the first charge and its implications through various means, and in different stages of the proceedings. LAD will examine whether there is room for further improvements in this process.

15. We note The Ombudsman's observation as separately stated in paragraph 5.12 that reminders to the assigned lawyers to submit draft bill of costs had been delayed. LAD would like to explain that when legal proceedings are concluded, it is normal for the parties to attempt to negotiate for an agreement on costs in a bid to save substantial costs on taxation. A bill of costs should not be drawn up until such attempts or negotiations have concluded.

16. This case in question is by no means a simple divorce case, there are many issues arising from the divorce and hence numerous court hearings. While the time taken by the assigned lawyer in drawing up the bill of costs was longer than usual, it should be noted that during the period between the making of the lump sum order in May 2002 and the submission of the bill, the assigned lawyer had actively engaged in negotiations with the opposite party on the issues of costs and the discharge of the injunction. LAD would like to point out that the aided person's interest has not been prejudiced because of the time taken. It should be noted that the costs were non-recoverable from the opposite party anyway as the opposite party was also on legal aid.

<u>Case 3 (paragraphs 4.7 to 4.11)</u>

17. Whilst we accept that the assigned lawyer had on occasions failed to render written response to LAD's requests, there was no delay in the progress of the case itself and the interest of the aided person was not affected. The assigned lawyer did not move the case forward before 2002 because the aided

person's medical condition had not yet stabilized. To proceed with the hearing of the assessment of damages before this would be premature and prejudicial to the aided person's interest and amount to negligence. Proceedings were restored in 2002, as soon as the medical condition of the aided person had stabilized.

18. In January 2001, the assigned lawyer reported to LAD that the rehabilitation program had been completed. It was apparent that the aided person needed time to adjust to his new prosthesis and major steps in the legal proceedings would not be expected for some time. Subsequent telephone conversations with the assigned lawyer also confirmed that the assigned lawyer had kept under review the progress of the aided person's medical condition throughout. In a telephone conversation in October 2001, the assigned lawyer informed LAD staff that the aided person's medical condition had not stabilized. In September 2002, the assigned lawyer reported to LAD staff over the telephone that he would be in a position to restore the court hearing shortly.

19. Since from the facts of the case, it was reasonable for LAD to expect that no major step in the proceedings would be taken until the medical condition of the aided person had stabilized, LAD staff did not consider it necessary and appropriate to take action against the assigned lawyer, or to re-assign the case to another lawyer mid-stream. LAD would certainly have acted differently if there was unexplained delay in the proceedings or the aided person's interest would be adversely affected.

20. With hindsight, it is accepted that a few of LAD's requests for progress reports, especially those issued in 2001, could have been dispensed with, since it was not expected that the proceedings could be taken forward then. To enhance LAD's performance in this regard, LAD has recently conducted a briefing as to when it is appropriate to issue requests for progress reports, for example, where there are reasons to expect progress in the proceedings should have been made.

<u>Case 4 (paragraphs 4.12 to 4.14)</u>

21. We accept that there was delay on the part of the assigned solicitor in the post judgment stage, namely in resolving the costs and disbursements, thereby affecting the timing of the aided person's receipt of the final payment.

The delay was mainly caused by some of the counsel and medical experts engaged in the case, who wanted to seek a review of the taxation made by the Master in taxation and who were therefore reluctant to refund the amount overpaid, despite repeated requests.

22. The assigned solicitor could have been more proactive in chasing for the refund. The performance of the assigned solicitor cannot be regarded as satisfactory. He was subsequently placed on the Record of Unsatisfactory Performance.

23. LAD, whilst recognizing the practical difficulties in recovering refund due from assigned lawyers and experts in this isolated case, would consider general ways and means to prevent undue delay by the assigned lawyers in dealing with matters concerning finalization of accounts.

<u>Case 5 (paragraphs 4.15 to 4.18)</u>

24. During the proceedings, because of the assigned solicitor's under-performance, LAD has repeatedly made suggestions to the aided person to consider re-assignment to another lawyer. However, the aided person responded that she wished to continue to be represented by the assigned lawyer, even as late as in July 2003. LAD respected the wish of the aided person and therefore did not re-assign the case unilaterally.

25. The aided person did not change her mind until August 2003 although she was informed earlier that the assigned lawyer's practice had been taken over by the Law Society. Her case was therefore assigned to the lawyer appointed to act as the Law Society's agent.

26. With regard to The Ombudsman's comments that LAD did not take earlier and firmer action against the assigned lawyer, we wish to clarify that LAD staff concerned had in fact made an evaluation report regarding the assigned lawyer's unsatisfactory performance in this case for submission to the DMC for consideration. By then, the assigned lawyer's practice had been taken over by the Law Society and he was already on the Record of Unsatisfactory Performance arising from another case.

Case 6 (paragraphs 4.19 to 4.24)

27. The assigned lawyer had performed reasonably well throughout the proceedings until after taxation of costs and LAD staff had monitored the case progress closely throughout. This case concerns an unprecedented situation in which the assigned lawyer had set out to practise a fraud on LAD.

28. We wish to clarify that it is LAD's practice pursuant to the relevant Legal Aid Regulations to make an interim payment to the assigned lawyer. This practice is considered reasonable as a litigation case can take years to conclude. At the time when LAD made the interim payment to the assigned lawyer in question, there was no reason to believe that he would practise a fraud. Indeed, in the preceding month, the assigned lawyer had paid the entire sum of the damages he received from the opposite party to LAD. Prior to this case, there has not been any case in which a Panel Lawyer has practised a fraud on LAD and subsequently absconded. Absconding for a fairly insubstantial sum of money as in the case in question could not have been reasonably foreseen, as the act is a drastic one which not only would tarnish the concerned lawyer's reputation, but would also ruin his long term career altogether.

29. When the assigned lawyer subsequently proposed to refund to LAD costs recovered from the opposite party by 3 monthly instalments, it appeared to the LAD staff that it was a pragmatic proposal. The lawyer had attached a cheque for the first instalment payment along with his proposal and there was no reason at the time to believe that the assigned lawyer would not pay up the rest as promised. Indeed, in the following month, the assigned lawyer duly paid the second instalment.

30. It is regrettable that the assigned lawyer has set out to practise a fraud on LAD and chosen to abscond. However, the decisions that LAD took during the process of this case were not unreasonable based on the information available and the circumstances at the material time. We are doubtful if other options, such as reporting the matter to the DMC or the Law Society when the assigned lawyer proposed to pay by instalments would have helped LAD to recover the sum due, as the move could hasten the assigned lawyer's abscondment or bankruptcy. In any event, LAD has after the lawyer's abscondment, reported the matter to the Police and the Law Society promptly and had removed the assigned lawyer from the Legal Aid Panel.

31. Whilst this is an unforeseeable and unfortunate event, LAD has learnt important lessons. LAD staff have since been instructed to be more alert and sensitive to such situations in future. LAD has also enhanced communication amongst staff and instructed staff to escalate matter to the directorate officers of any suspicious circumstances, e.g. where the assigned lawyers fail or delay in remitting monies to LAD or where there are indications that the assigned lawyers might be in financial difficulty. Directorate officers would then consider appropriate actions to safeguard the public fund and the aided persons' interest. Also, staff has been instructed to reject all future proposals by assigned lawyers to pay by instalments outright and to report the matter to the Law Society if full payment is not made forthwith. That said, this is an extremely rare and isolated case. We have confidence that the legal profession in Hong Kong on the whole is professional and ethical.

32. LAD is using its best endeavours to explore ways to see that the aided person would receive the damages due to her in this case.

Case 7 (paragraphs 4.25 to 4.28)

33. The issue in this case does not concern the monitoring of assigned lawyers' performance but the recovery of costs due from the opposite party.

34. Enforcement proceedings entail costs. Where the costs so involved cannot be recovered from the opposite party, they would have to be borne by the aided person (where there is first charge or contribution paid or payable by the aided person) or the public fund. Hence, in deciding whether to take enforcement proceedings, LAD has to consider such factors as the amount of costs due, prospects of success of the enforcement proceedings, whether the opposite party has made any proposal for payment by instalments, the reasonableness of the proposal, and the financial position of the opposite party. If LAD insists on embarking on enforcement proceedings notwithstanding that there is a reasonable offer of settlement from the opposite party, LAD's action is likely to be viewed by the court as being oppressive and may amount to an abuse of the process of court. In this connection, it is worth noting that many of the judgment debtors in aided matrimonial cases are not in any better financial situation than the aided persons. Most are either unemployed or manual workers on meager income. We do not propose to go for enforcement proceedings indiscriminately, without taking into account the judgment

debtors' financial capability to pay up.

35. In this case, taking into account the amount of overdue costs involved (about $35,000), the opposite party's financial position (a casual construction site worker with an unstable monthly income of about $7,000), the opposite party's undertaking to pay by instalments, and the potential costs involved in taking enforcement proceedings (at least a several thousand dollars), LAD considered that it not cost-effective to take enforcement proceedings.

36. As a result of the staff's conscientious efforts and perseverance, LAD succeeded in recovering about $15,000 from the opposite party which was the best achievable result in the given circumstances, set against the other option of having to write off the entire sum of about $35,000 at the outset.

37. As seen from above, it is not a case that "LAD was reluctant to take legal action to enforce judgment". LAD did not make "empty threats", rather what LAD did in this case was employing a litigation tactic to try to recover the money due. If the report is presented in its present form, it may cause loss to the government revenue as the public may view threats made by LAD as empty threats.

General Observations (paragraph 4.29)

38. With the explanation to the specific cases above, LAD hopes that one would appreciate that there are reasonable explanations for the decisions/actions taken at the material time by LAD staff, given the circumstances and information available at the time. The Ombudsman has observed delay or under-performance on the part of the assigned lawyer in cases 2, 3, 4, 5 and 6. For cases 2 and 3, LAD considered that there were justifiable reasons for the time taken and the aided persons' interest was not jeopardized in the cases. For cases 4, 5, and 6, the lawyers concerned have been placed on the Record of Unsatisfactory Performance or even removed from the Legal Aid Panel subsequently. We hence feel disheartened at The Ombudsman's observations that LAD did not enforce the guidelines in practice, that LAD's guidelines and actions failed to protect the aided persons' interest, and that LAD is apparently reluctant to take firm action. As regards the observation that the DMC seems unable to act as a deterrent to incompetent and/or ineffectual assigned lawyers, one would appreciate that no single system

could be full proof against incompetent or ineffectual member in the profession. We would also like to add that according to the Questionnaires returned by aided persons in our Customer Service Surveys from 2003 to June 2005, an average of 89% of the aided persons are either satisfied or very satisfied with the overall performance of assigned solicitors.

39. Notwithstanding the above, we accept that in some of the cases studied, there are lessons to be learnt, and room for consideration of making further improvement. As stated in paragraphs 20, 23 and 31 above, we have identified areas for improvements or are in the process of implementing them.